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7 KENNETH A. ROGERS,
8 Petitioner,
9 v.
10 GARRY SWARTHOUT,
11 Respondent.

Case No. [14-cv-03087-EMC](#)

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28 **ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

I. INTRODUCTION

Kenneth A. Rogers filed this *pro se* action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 to challenge his state court conviction for conspiracy to commit murder and attempted murder with premeditation. Respondent has filed an answer to the petition and Mr. Rogers has filed a traverse. For the reasons discussed below, the Court denies the petition.

II. BACKGROUND

The California Court of Appeal described the evidence:

Appellant was the chairperson of the Westport County Water Board and the assistant chief of the Westport Volunteer Fire Department. He was active in the local Republican Party and believed he had a future in Sacramento. Alan Simon, the victim in this case, moved to Westport in 2002.

Appellant was not universally popular in local politics. In 2004, a petition circulated to recall him from the water board. Simon signed the petition and became the only candidate to run against appellant. Appellant visited Simon at his house and asked him to remove his name from the recall petition, but Simon refused. In an election held August 31, 2004, appellant was recalled from office on a vote of 29 to 19, and Simon replaced him.

In December 2004, appellant called Simon and said that if he did not put 50,000 gallons of water in the water storage tank by the next morning, appellant “was going to hang” him. Knowing that

appellant was angry about losing the recall election, Simon construed this as a serious threat on his life and reported it to law enforcement.

On January 19, 2005, the water board, led by Simon, voted to replace the chief of the volunteer fire department and appellant, the assistant chief. Appellant said this was a “terrible day for Westport” and filed a lawsuit challenging his termination.

In March 2005, Richard Peacock was released from prison. Appellant knew Peacock and gave him a job at his auto detailing business in Sacramento. Peacock told his parole officer that he “loved” appellant because of their friendship and “would do anything for him.”

By May of 2005, Simon had decided to move from Westport and put his home up for sale. Also in May 2005, appellant told a woman who was notarizing loan documents for him that he felt incensed and persecuted over his removal from the water board and fire department.

On June 17, 2005, Richard Peacock travelled to Westport in a white convertible Miata. He was stopped by a police officer in the town of Williams for driving with expired registration and said that he was traveling to Mendocino County with his parole officer's permission. In fact, he did not have his parole officer's permission.

At about 10:30 that night, Richard Peacock knocked on the front door of Alan Simon's house in Westport, aggressively demanding to speak to "Kathy." Simon, who was alone inside, told the man he had the wrong house and called 911. While still on the phone with the dispatcher, Simon opened his door and saw a man leaning against a white sports car with front end damage. Peacock walked back toward Simon, saying, "Hey, man, I don't want any trouble," and then pulled out a gun and fired it at Simon, grazing his head. Simon stepped back inside, closed his front door, and dropped to the floor inside his house. Peacock fired several more shots through the door and injured Simon's right wrist. Police who investigated the scene eventually found eight expended .22 caliber shell casings on Simon's front lawn and nine bullet holes in his front door.

Law enforcement officers spotted Peacock driving the white Miata near Westport the following day. When they attempted to stop him, he accelerated and threw a white plastic bag out the window. Peacock eventually stopped the car and was arrested; the bag was recovered and contained a Ruger .22 caliber semiautomatic handgun containing only one of ten rounds. Ballistics tests revealed that the Ruger was the gun used in the Simon shooting.

The gun was previously owned by Velma Bowen, who had allowed appellant and his family to stay in her home in 1999. During the visit, appellant had stored some guns that he owned under Bowen's bed, near a box where she stored her .22 Ruger. After appellant and his family moved out, Bowen discovered the Ruger was missing. She asked appellant whether he had taken her gun, but he said no, he had his own Ruger. According to appellant's wife, however, she and

appellant later found Bowen's gun in a toolbox and assumed it had been taken inadvertently during their move out of Bowen's home.

Appellant was interviewed about the Simon shooting by Mendocino County Sheriff's Department Detective Alvarado. Appellant acknowledged that he had issues with Simon (describing him as "an asshole," "rude," and "a jerk") but denied having anything to do with the shooting. He admitted telling Simon he wanted to "hang" him politically. Appellant told Alvarado that Richard Peacock and his brother Michael Peacock were convicts, that he had known Richard Peacock for 12 to 15 years, and that he had given Richard Peacock a job in his auto body business because he liked to help people. Appellant said he had also employed Michael Peacock as a groundskeeper of some property he owned near the Jack of Hearts Creek, where he grew marijuana. Appellant was concerned about publicity regarding the marijuana because it was "not really the best thing for a Republican representative to have."

Appellant acknowledged that Richard Peacock had come to the Jack of Hearts property about a week earlier in a white convertible. He told Detective Alvarado that he “hoped to God” Richard Peacock was not involved in the Simon shooting, and commented, “I think Al [Simon] would set up shit like this.” When Alvarado said that seemed unlikely given Simon’s injuries, appellant suggested that the shooter could have been the husband of one of the women Simon had been “sleeping around with.” Appellant complained about the lack of respect shown to him by the “new blood” in Westport and about Simon’s public ridicule of him. Appellant continued to deny his involvement in the shooting in a subsequent interview.

On June 26, 2005, Richard Peacock called appellant from the Mendocino County jail and complained about the charges against him. Appellant told him, “[T]hey’re trying to pull me into this whole thing, too.” Appellant promised to “be there” for Peacock and to “take care of every bit of business on the outside that I have to ... until you’re out and free and released from this garbage.” Peacock told appellant he was “sorry that all this came to your doorstep.”

On June 28, 2005, the authorities searched appellant's Jack of Hearts property and seized 120 to 130 marijuana plants and processed marijuana. Also seized was a digital camera which contained a photo of Alan Simon's home, taken from the inside of a vehicle sometime after March 11, 2005.

Appellant was arrested and on June 29, 2005, made a telephone call from jail to his wife in which they spoke about the evidence against appellant being a "convict story." Appellant called his auto detailing business on the same day and told the person who answered to "make sure everything's all cleaned up." He complained that "Michael and Richard are pulling some bullshit, I don't know what ... my bail is like half a million dollars."

Meanwhile, Richard Peacock received a letter while in jail that read, "Dear Richard. [¶] Hope all is going okay for you. I heard about Michael[‘]s B.S. and can’t believe he could be related to you. Anyway, I will get the "Red Dog" to your kid with some school

1 clothes, money, and will keep an eye out for her. Hope to see you
 2 soon, but it's tough. I'm sending ... \$40 for your books, more to
 3 come. [¶] Your friend, Kate. [¶] P.S. Who's this Keith guy calling
 4 for Michael? I'm not returning his calls. I think he has \$ for?" The
 5 letter had a Yuba City postmark but no address; Richard Peacock
 6 did not know any "Kate" from Yuba City, and thought appellant's
 7 wife had sent the letter.

8 Appellant was called as a witness at Richard Peacock's preliminary
 9 hearing on August 4, 2005, and winked at Peacock as he left the
 10 stand. Later in the day, appellant's then-attorney Donald Masuda
 11 gave Peacock's attorney a message to the effect that appellant
 12 wanted Peacock to know that appellant's wife would be looking
 13 after or taking care of Peacock's daughter. When this message was
 14 relayed to Peacock, he became extremely upset and angry and said
 15 that the message was a threat to harm Peacock's daughter. Peacock
 16 explained that the "Red Dog" mentioned in the letter from "Kate"
 17 was a gun that had a red handle or an emblem of a red dog on the
 18 handle.²

19 Footnote 2: Richard Peacock did not testify, but the
 20 prosecutor offered his statements about the threat and the
 21 "Red Dog" letter under the spontaneous statement exception
 22 to the hearsay rule, based on his demeanor upon receiving
 23 the message. (See Evid. Code, § 1240.)

24 In addition to the evidence described above, the prosecution called
 25 Michael Peacock as a witness at appellant's trial. He testified that he
 26 had a lengthy criminal record and had spent time in prison. In 2003,
 27 appellant and Michael Peacock had several conversations about a
 28 Black man in Westport, and appellant was "wishing somebody
 [would] hurt him, beat him up...."³ Michael Peacock thought
 appellant had offered him money and/or marijuana to beat the man
 up. He helped appellant grow marijuana on his property and saw
 guns on that property, including one that looked like the gun used in
 the attack against Alan Simon.

29 Footnote 3: Keith Grier, a Westport resident who attended
 30 meetings of the water board, was asked to be a candidate
 31 against appellant in the recall election, but declined. Grier is
 32 African American.

33 According to Michael Peacock, he and his brother Richard had a
 34 conversation in Sacramento either the day of or the day before the
 35 Simon shooting. Richard told Michael he had plans to visit Westport
 36 and that appellant had asked him to "severely hurt" the guy who had
 37 got appellant "kicked off the water board." Michael had told police
 38 that Richard said he had been offered three to four pounds of
 39 marijuana by appellant to carry out the attack. Richard was looking
 40 for a "piece" and asked Michael where he could get one, though he
 41 did not say he was going to use a gun on Alan Simon.⁴

42 Footnote 4: The hearsay statements made by Richard
 43 Peacock to Michael Peacock were admitted as declarations
 44 against interest and statements in furtherance of a
 45 conspiracy. (Evid. Code, §§ 1230, 1223.)

1 To rebut the evidence that appellant had threatened Richard
2 Peacock's daughter with a gun known as the "Red Dog," appellant's
3 wife, Christine Rogers, testified that she had helped Richard
4 Peacock's wife and his daughter financially, and that appellant had
5 promised Richard he would give his daughter a large stuffed
6 animal—Clifford, the Big Red Dog—that he had won at the Marine
7 World theme park. Alva Haught, who knew appellant and Richard
8 Peacock, testified that in early 2005, he had seen the stuffed dog in
9 appellant's auto body shop and asked if he could have it to give to
10 his daughter.

11 Eric Beren, who knew both appellant and Richard Peacock, testified
12 that Peacock was scary, violent and "institutionalized." Peacock did
13 not have a lot of friends, and Beren believed he was so loyal to the
14 friends he did have that he would take violent action against anyone
15 who gave them problems. Beren also claimed that he and his wife
16 had been interested in buying property in Westport and that
17 appellant would sometimes show them pictures of houses for sale in
18 that area on his digital camera.

19 The police officers who searched appellant's home and his property
20 on Jack of Hearts Creek did not find a gun with a red handle or a
21 picture of a red dog on the grip.

22 *People v. Rogers*, No. A128650, 2012 WL 2053568, at *1-4 (Cal. Ct. App. June 5, 2012).

23 Mr. Rogers was convicted of one count of conspiracy to commit murder and one count of
24 attempted murder with premeditation. The superior court sentenced him to twenty-five years to
25 life in state prison. He appealed. The California Court of Appeal affirmed the judgment of
26 conviction and denied Mr. Rogers' petition for writ of habeas corpus on June 5, 2012. The
27 California Supreme Court denied Mr. Rogers' petitions for review on September 12, 2012. Mr.
28 Rogers then filed several additional unsuccessful collateral challenges in the state courts.

29 On July 8, 2014, Mr. Rogers filed his federal petition for writ of habeas corpus. He
30 presented these claims for relief: (1) he was denied counsel at a critical stage of the proceedings
31 when his retained counsel was allowed to withdraw in a hearing at which Mr. Rogers was not
32 represented by counsel; (2) he received ineffective assistance of trial counsel when trial counsel
33 failed to make a Confrontation Clause objection to Michael Peacock's testimony about statements
34 made by Richard Peacock; and (3) appellate counsel was ineffective in not arguing (a) that trial
35 counsel was ineffective in failing to make the Confrontation Clause objection and (b) that
36 structural error occurred. Respondent filed an answer to the petition and Mr. Rogers filed a
37 traverse.

III. JURISDICTION AND VENUE

This Court has subject matter jurisdiction over this action for a writ of habeas corpus under 28 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the petition concerns the conviction and sentence of a person convicted in Mendocino County, California, which is within this judicial district. 28 U.S.C. §§ 84, 2241(d).

IV. STANDARD OF REVIEW

This Court may entertain a petition for writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

The Antiterrorism And Effective Death Penalty Act of 1996 (“AEDPA”) amended § 2254 to impose new restrictions on federal habeas review. A petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court’s adjudication of the claim: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

“Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts.” *Williams (Terry) v. Taylor*, 529 U.S. 362, 412-13 (2000).

“Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. “[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411. “A federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was ‘objectively unreasonable.’” *Id.* at 409.

V. DISCUSSION

A. Claim 1: Denial Of Counsel At Hearing On Counsel's Motion To Withdraw

1. Background

As mentioned at pages 3-4, above, evidence was admitted at trial that Richard Peacock received a message from Mr. Rogers (relayed via Mr. Rogers' attorney at Richard Peacock's preliminary hearing) and the "Red Dog" letter that Richard Peacock interpreted as threats. Long before trial started, a hearing was held on January 28, 2008, to determine whether this evidence was admissible pursuant to California Evidence Code section 403. RT 178.

At the section 403 hearing on January 28, 2008, attorney Donald Masuda represented Mr. Rogers. The first witness at the hearing was Wes Hamilton, a public defender who represented Richard Peacock at the preliminary hearing on August 4-5, 2005. RT 178. After Mr. Hamilton provided some preliminary information, Mr. Masuda began his lengthy and vigorous efforts to prevent Mr. Hamilton from testifying as to the effect the message had on Richard Peacock, repeatedly objecting on the grounds of hearsay, attorney/client privilege and that the admission of the statement would violate Mr. Rogers' Confrontation Clause rights. *See* RT 183-200. Mr. Masuda's objections were unsuccessful, and Mr. Hamilton eventually testified about Richard Peacock's reaction to the message he received at the preliminary hearing. RT 185, 200. That message had been delivered via a relay: Mr. Hamilton testified that "Mr. Masuda gave me a message from Mr. Rogers to give to my client, Mr. Peacock." RT 182. The court ruled the evidence of Richard Peacock's reaction to the message was admissible under the spontaneous declaration exception to the hearsay rule. RT 199. The prosecutor then attempted to ask Mr. Hamilton about the Red Dog letter, RT 201, and Mr. Masuda objected to the letter as hearsay.

The trial court then expressed concern about Mr. Masuda's ability to continue as defense counsel in the case. RT 201. The court explained that the issue of Mr. Masuda's ability to continue as counsel in this case arises "as soon as Mr. Hamilton testifies that he received this information from the attorney for the defendant, it raises questions about counsel" in terms of whether and what he knew about the potential threat to the witness. RT 201. The court noted that a stipulation might work, but otherwise "I think this would be material evidence. I think if it

1 comes in, if it's what it's represented to be, it seems like it's important evidence in the case in the
2 question of guilt or innocence. It would seem to me that at minimum, Mr. Masuda may have to
3 take the stand just simply to deny that he had any knowledge of what was going on and had no
4 participation other than he thought, innocently, he was conveying information about Mr.
5 Peacock's daughter. [¶] But that still raises the issue of his credibility and I'm concerned about
6 that." RT 202. The court was concerned that the jury would wonder whether counsel was an
7 innocent messenger or knew he was assisting in the making of a threat. RT 203. The prosecutor
8 and the court both made the point that they were not accusing counsel of knowingly aiding in the
9 making of a threat, and the court's concern was the possibility that the jurors might doubt Mr.
10 Masuda's credibility if they heard he was the messenger who delivered the threat. RT 203-04.
11 The court explained that, now that it had "ruled that Mr. Hamilton is going to testify in terms of
12 this statement that was made. And now I know that [Mr. Masuda is] involved in that. So, I think
13 this is the proper time to raise the question" about Mr. Masuda's ability to continue representing
14 Mr. Rogers. RT 204, 205 (court notes that "we at least had to get to the point that the court's
15 satisfied that the statement is coming in. If it didn't come in, then the whole thing is moot").

16 Mr. Masuda then stated: "I can't even continue to represent Mr. Rogers even in this
17 hearing because, like you say and indicate, I may be a witness in this hearing as to the
18 admissibility of some of these other statements." RT 204. He further stated: "I'm not going to be
19 a witness and litigate in the same proceeding. . . . I'm not going to be a witness, argue my
20 credibility to 12 jurors and then argue on behalf of Mr. Rogers that they should believe me." RT
21 206. The court agreed that Mr. Masuda could not testify and represent Mr. Rogers at the same
22 time and observed that, even if Mr. Masuda did not testify, his credibility might come in to
23 question if the jury learned that he had delivered the message. RT 206-07. A short recess was
24 taken so that Mr. Masuda could confer with his client and the prosecutor. RT 207. The court
25 stated: "If your client's not willing to waive the potential conflict, you need to decide whether
26 you're willing to enter into a stipulation. And I guess you need to talk to your client about that
27 aspect. And if not, I think I'm in a position I'll have to relieve you." RT 207. After the recess,
28 Mr. Masuda asked to be relieved as counsel, stating that he believed he would have to testify. RT

1 208. Mr. Masuda asked for someone other than a public defender be appointed to represent Mr.
2 Rogers. RT 208. The court deferred, stating that he did not know Mr. Rogers' financial situation
3 and, if Mr. Rogers could afford counsel, he would be given time to retain counsel. RT 208. The
4 court stated that "I think based on what I've heard, you should be relieved." RT 208; RT 210 ("I
5 am relieving you as counsel . . . based on the conflict."). The court also explained that the court
6 could not appoint counsel if Mr. Rogers had the ability to retain counsel, and told him to apply for
7 the appointment of counsel so a financial determination could be made. RT 209-10. The court set
8 the matter for a status conference in three weeks to give Mr. Rogers time to hire counsel or explain
9 his efforts to hire counsel. RT 211. The court then formally paused the hearing on the Rule 403
10 motion to determine the admissibility of the Red Dog letter. "This proceeding will be stayed at
11 this point and we will continue the matter once he has new counsel." RT 211. The court set a
12 hearing date for February 22, 2008, and stated, "Mr. Rogers, that's for you to appear with counsel
13 if you have counsel. If you don't have counsel, be prepared to respond to the court's questions in
14 terms of efforts you've made to obtain counsel." RT 211-212. Mr. Rogers agreed and thanked the
15 court when the court noted that if, at the February 22 hearing, "you need more time, the court will
16 certainly consider it." RT 212.

17 At the January 28, 2008 hearing, Mr. Rogers did not object or otherwise disagree with Mr.
18 Masuda's motion or the court's ruling allowing him to withdraw. *See* RT 204-211. After counsel
19 withdrew, it took many months for Mr. Rogers to obtain a new attorney, apparently due in large
20 part to the fact that he did not qualify for court-appointed counsel because he owned a business but
21 did not have readily available funds to pay an attorney of his choice. *See* RT 253.

22 In his federal petition for writ of habeas corpus, Mr. Rogers claims that he was denied
23 counsel at the hearing on January 28, 2008, at which Mr. Masuda was permitted to withdraw. Mr.
24 Rogers urges that separate counsel should have been provided to him so that he would have had an
25 opportunity to be heard and resist the efforts of his retained attorney to withdraw from the case
26 without first refunding part or all of the \$87,500 retainer Mr. Rogers had paid him for
27 representation through trial. Mr. Masuda's withdrawal allegedly prejudiced Mr. Rogers because,
28 without a refund from the retainer, he was without readily available funds to hire a replacement

1 attorney.

2 Mr. Rogers' claim that he was denied counsel at the hearing on the motion to withdraw
3 was rejected without discussion by the California Supreme Court. *See* Resp. Ex. W. The claim
4 had been presented in Mr. Rogers' petition for review of the California Court of Appeal's denial
5 of Mr. Rogers' motion to recall the remittitur and reinstate the appeal. Resp. Ex. V at 4, 7-8.¹

6 2. Analysis

7 The Sixth Amendment guarantees to a person accused of a state or federal crime the
8 effective assistance of counsel at trial. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In
9 order to satisfy the Sixth Amendment, counsel must be present at all "critical stages" of the
10 prosecution, absent an intelligent waiver by the defendant. *United States v. Wade*, 388 U.S. 218,
11 226, 237 (1967); *United States v. Hamilton*, 391 F.3d 1066, 1070-71 (9th Cir. 2004). It is not
12 enough that counsel be present at trial; counsel also must be present "at any stage of the
13 prosecution, formal or informal, in court or out, where counsel's absence might derogate from the
14 accused's right to a fair trial." *Coleman v. Alabama*, 399 U.S. 1, 7 (1970) (quoting *Wade*, 388
15 U.S. at 226). The Supreme Court has identified the following as critical stages of the prosecution,
16 and therefore as stages at which the defendant has the right to counsel: an arraignment, *id.* at 7
17 (citing *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961); a postindictment pretrial lineup, *Wade*, 388
18 U.S. at 226; and a preliminary hearing, *Coleman*, 399 U.S. at 9-10. Where counsel is absent
19 during a critical stage, the defendant need not show prejudice because the adversarial process itself
20 has become presumptively unreliable. *United States v. Cronic*, 466 U.S. 648, 659 (1984) ("The
21 presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the
22 accused is denied counsel at a critical stage of his trial.").

23 The Supreme Court has not held that a hearing on a defense counsel's motion to withdraw
24 as counsel is a critical stage at which counsel must be present. The Supreme Court also has never
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26 ¹ On direct appeal, Mr. Rogers had asserted a different claim regarding Mr. Masuda: Mr. Rogers
27 had argued that he was deprived of the right to counsel of his choice because the court allowed
28 Mr. Masuda to withdraw based on a conflict of interest that did not actually exist. The California
Court of Appeal discussed and rejected that claim, *see Rogers*, 2012 WL 2053568, at *7-9, and
Mr. Rogers does not repeat that claim in his federal habeas petition.

1 held that, when a defense attorney moves to withdraw based on a perceived conflict, the trial court
2 must provide a separate attorney for the defendant before the trial court may consider defense
3 counsel's motion.

4 One case that, at first glance, may appear to show the existence of the claimed right but
5 ultimately does not support Mr. Rogers' position is *Holloway v. Arkansas*, 435 U.S. 475 (1978).
6 There, an attorney who had been appointed to represent three codefendants, moved for
7 appointment of separate counsel for each codefendant; he made the motion a few weeks before
8 trial, on the morning set for trial and again during the trial. The attorney explained in his motions
9 that, because of confidential information received from the codefendants, he was confronted with
10 the risk of representing conflicting interests and therefore could not provide effective assistance
11 for each client. The trial court refused to appoint separate attorneys, and told counsel to let the
12 defendants testify in narrative form as a way to address counsel's alleged inability to cross-
13 examine each of them due to his claimed conflict. *See id.* at 479-80. The Supreme Court found
14 the trial court's approach wholly unacceptable. The Court stated that it did not need to resolve
15 how to evaluate a claim where defense counsel failed to advise the trial court of a conflict because
16 defense counsel in this case did alert the court to a conflict.

17 Here trial counsel, by the pretrial motions of August 13 and
18 September 4 and by his accompanying representations, made as an
19 officer of the court, focused explicitly on the probable risk of a
20 conflict of interests. The judge then *failed either to appoint separate*
counsel or to take adequate steps to ascertain whether the risk was
too remote to warrant separate counsel. We hold that the failure, in
21 the face of the representations made by counsel weeks before trial
and again before the jury was empaneled, deprived petitioners of the
22 guarantee of "assistance of counsel."

23 *Id.* at 484 (emphasis added; footnote omitted).

24 The italicized portion of that block quote from *Holloway* does not stand for the proposition
25 that a trial court must appoint separate counsel for the defendant for purposes of litigating the
26 motion for new counsel. It is clear from the context that the italicized portion of the block quote
27 from *Holloway* refers to the need to appoint separate counsel to represent the codefendants at trial,
28 rather than a need to appoint separate counsel to represent the codefendants at the hearing on the

1 motion for separate counsel. In *Holloway*, there would have been no need to appoint separate
2 attorneys for the codefendants just for the purpose of the hearing because the attorney's argument
3 was not antagonistic to each codefendant's interest; the one attorney was making the argument that
4 each codefendant had the right to a separate attorney. Further, the discussion that followed the
5 quoted portion of *Holloway* concerned the conduct of trial and the need to refrain from forcing
6 counsel to pursue diverging and inconsistent interests. *See id.* at 484-85. Finally, *Holloway*'s
7 mention of an alternative to appointing separate counsel -- the trial court could appoint separate
8 counsel *or* "take adequate steps to ascertain whether the risk was too remote to warrant separate
9 counsel" -- would be pointless if counsel had to be appointed for the hearing on the motion
10 because that would be the point at which the court would be deciding whether the risk of conflict
11 was too remote to warrant separate counsel. In other words, counsel did not need to be appointed
12 for the court to determine that it is unnecessary for counsel to be appointed.

13 That *Holloway* does not establish a right to separate counsel at a motion to withdraw or a
14 motion to substitute counsel is confirmed by later Supreme Court decisions describing the case.
15 *See Mickens v. Taylor*, 535 U.S. 162, 168 (2002) (*Holloway* "creates an automatic reversal rule
16 only where defense counsel is forced to represent codefendants over his timely objection, unless
17 the trial court has determined that there is no conflict."); *id.* at 189 (Souter, J., dissenting) (citing
18 *Holloway* for proposition that, "[u]nless the judge finds that the risk of inadequate representation
19 is too remote for further concern, or finds that the defendant has intelligently assumed the risk and
20 waived any potential Sixth or Fourteenth Amendment claim of inadequate counsel, the court must
21 see that the lawyer is replaced"); *Wheat v. United States*, 486 U.S. 153, 159-60 (1988) ("While
22 'permitting a single attorney to represent codefendants . . . is not *per se* violative of constitutional
23 guarantees of effective assistance of counsel' *Holloway*, [435 U.S. at 482], a court confronted with
24 and alerted to possible conflicts of interest must take adequate steps to ascertain whether the
25 conflicts warrant separate counsel").

26 Although the Supreme Court has not established a right to separate counsel at a hearing on
27 a motion to substitute counsel, the Ninth Circuit has recognized that separate counsel may be
28 appropriate sometimes. "In the context of a motion to substitute counsel, [the Ninth Circuit] has

1 suggested that separate counsel may be warranted, for purposes of the motion, where current
2 counsel fails to assist the defendant in making the motion or takes an adversarial and antagonistic
3 stance regarding the motion.” *Stenson v. Lambert*, 504 F.3d 873, 888 (9th Cir. 2007). *Stenson* did
4 not state that the Supreme Court had required appointment of separate counsel for the hearing and
5 instead cited only Ninth Circuit cases for the proposition that separate counsel may be warranted
6 for the hearing on the motion to substitute. *See id.* at 888-89. *Stenson* actually held that the state
7 supreme court’s determination that the trial court was not required to appoint independent counsel
8 to represent the defendant at the motion to substitute counsel “was a reasonable application of
9 Supreme Court precedent” because the attorney “did not engage in egregious conduct amounting
10 to an absolute denial of representation.” *Id.* at 889.

11 Not only is *Stenson* not “clearly established law” from the Supreme Court for purposes of
12 § 2254(d), *Stenson* is distinguishable in several ways. First, the motion under consideration was
13 of a different sort than that here. Mr. Rogers was not trying to obtain a new attorney. Unlike
14 *Stenson*, the attorney in Mr. Rogers’ case wanted to withdraw and Mr. Rogers did not express
15 disagreement with the attorney’s request. *See United States v. Dompier*, 361 F. App’x 823, 824
16 n.1 (“Separate counsel is not warranted, for purposes of the substitution motion, unless current
17 counsel takes an adversarial and antagonistic stance regarding the motion.”) Second, if Mr.
18 Rogers wanted to force Mr. Masuda to continue to represent him, his argument would have been
19 that there was *no* conflict of interest. He did not make that argument. Third, the *Stenson*
20 defendant had an appointed counsel, whereas Mr. Rogers had retained counsel. Even if *Stenson*
21 supported the proposition that Mr. Rogers could have a separate attorney, Mr. Rogers would have
22 had to hire that attorney as nothing in *Stenson* gives a client who can afford an attorney a right to
23 have a separate counsel appointed on his behalf. In other words, if a separate attorney was
24 necessary, it would have been incumbent on Mr. Rogers to hire him or her because Mr. Rogers did
25 not qualify for appointment of counsel at state expense. Mr. Rogers took no steps to hire a second
26 attorney to resist Mr. Masuda’s motion to withdraw as counsel.

27 Mr. Rogers’ first claim fails at the threshold because the Supreme Court has never held
28 that a client has a right to have a separate attorney represent him when his defense counsel moves

1 to withdraw from the case. There is no “clearly established Federal law, as determined by the
2 Supreme Court of the United States,” which is a necessary predicate to relief in any habeas case
3 (such as this one) governed by the AEDPA. *See* 28 U.S.C. § 2254(d)(1). Without the existence of
4 clearly established Federal law, the state court’s rejection of the claim cannot be said to be
5 contrary to or an unreasonable application of such law. *See Carey v. Musladin*, 549 U.S. 70, 77
6 (2006); *see, e.g., id.* at 76-77 (given the lack of holdings from the Supreme Court and the wide
7 divergence of the lower courts on the issue of the potentially prejudicial effect of spectators’
8 courtroom conduct, the state court’s determination that the petitioner was not inherently
9 prejudiced by spectators wearing buttons depicting the murder victim was not contrary to or an
10 unreasonable application of clearly established Supreme Court law); *Wright v. Van Patten*, 552
11 U.S. 120, 126 (2008) (per curiam) (although Supreme Court had held that prejudice may be
12 presumed when counsel is completely absent from proceedings, no Supreme Court precedent
13 squarely addressed whether counsel’s telephonic appearance should be treated as a complete
14 denial of counsel; “because our cases give no clear answer to the question presented, let alone one
15 in [the habeas petitioner’s] favor, it cannot be said that the state court unreasonably applied clearly
16 established Federal law”); *Varghese v. Uribe*, 736 F.3d 817, 821 (9th Cir. 2013) (because there is
17 no Supreme Court authority that squarely addresses petitioner’s claim – that a criminal
18 defendant’s rights to counsel and due process are violated when the state court conditions his
19 access to, and testing of, the prosecution’s limited evidence on the disclosure of the test results to
20 the prosecution – the state appellate court had no specific rule to apply, so its decision was not an
21 unreasonable application of clearly established Supreme Court precedent); *Foote v. Del Papa*, 492
22 F.3d 1026, 1030 (9th Cir. 2007) (Nevada Supreme Court’s rejection of petitioner’s conflict of
23 interest claim was neither contrary to nor an unreasonable application of clearly established
24 federal law; although Supreme Court had held an irreconcilable conflict between a defendant and
25 his trial counsel may entitle him to new counsel, no Supreme Court case had held an irreconcilable
26 conflict between the defendant and his appointed appellate counsel violates the Sixth
27 Amendment). Mr. Rogers is not entitled to relief on his first claim.

1 B. Claim 2: Ineffective Assistance of Trial Counsel2 1. Background

3 Mr. Rogers claims that his trial counsel provided ineffective assistance when he failed to
4 make a Confrontation Clause objection to Michael Peacock's testimony about statements made by
5 Richard Peacock.²

6 At trial, Michael Peacock testified that he had a conversation with his brother, Richard
7 Peacock, in June 2005 in Sacramento. Michael Peacock testified that (1) Richard Peacock told him
8 that he (Richard) had plans to visit Mr. Rogers regarding "some issues probably pertaining to what
9 took place," RT 1292, 1305; (2) Richard Peacock told Michael that Mr. Rogers had asked Richard
10 "to severely hurt the guy" who had caused Mr. Rogers to get "kicked off the water board," RT
11 1301; (3) "we had conversation about him going to put hands on Simon and all that kind of stuff,"
12 RT 1306; and (4) he (Michael) told the police that his brother (Richard) had told him he (Richard)
13 was not going to kill Simon but was going to hurt him, RT 1307.

14 The trial court ruled that Richard Peacock's statements as to what Richard Peacock was
15 going to do were admissible under the declaration against penal interest exception to the hearsay
16 rule. RT 1296-97. The trial court also ruled that the evidence was admissible under California
17 Evidence Code section 352, which requires balancing probative value against prejudice. *Id.* at
18 1297. The trial court also ruled that Michael Peacock could testify about statements made by
19 Richard Peacock as to what Mr. Rogers had told Richard Peacock, as those statements were
20 admissible because they were made in furtherance of the conspiracy. RT 1299-1300. Counsel did
21 not assert an objection under the Confrontation Clause.

22 The California courts rejected Mr. Rogers' Confrontation Clause claim without discussion.

23 Resolution of Mr. Rogers' ineffective-assistance claim is straightforward: A Confrontation
24 Clause objection would have been denied because the testimony was not barred by the
25 Confrontation Clause. Counsel did not engage in deficient performance in failing to make the

27 ² Plaintiff does not claim IAC due to any alleged failure to assert a state law hearsay objection.
28 The hearsay objection was made (RT 1296) and was overruled as declaration against penal
interest.

1 meritless objection, and there was no resulting prejudice.

2 2. Analysis

3 a. Ineffective Assistance Of Counsel Standards

4 The Sixth Amendment's right to counsel guarantees not only assistance, but effective
5 assistance, of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The benchmark for
6 judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper
7 functioning of the adversarial process that the trial cannot be relied upon as having produced a just
8 result. *Id.* In order to prevail on a Sixth Amendment ineffectiveness of counsel claim, a petitioner
9 must establish two things. First, he must demonstrate that counsel's performance was deficient
10 and fell below an "objective standard of reasonableness" under prevailing professional norms. *Id.*
11 at 687-88. Second, he must establish that he was prejudiced by counsel's deficient performance,
12 i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result
13 of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability
14 sufficient to undermine confidence in the outcome. *Id.*

15 A "doubly" deferential judicial review is appropriate in analyzing ineffective assistance of
16 counsel claims under § 2254. *See Cullen v. Pinholster*, 563 U.S. 170, 202 (2011). The "question
17 is not whether counsel's actions were reasonable. The question is whether there is any reasonable
18 argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S.
19 86, 105 (2011).

20 b. A Confrontation Clause Objection Would Have Failed

21 The Confrontation Clause of the Sixth Amendment provides that in criminal cases the
22 accused has the right to "be confronted with witnesses against him." U.S. Const. amend. VI. The
23 ultimate goal of the Confrontation Clause "is to ensure reliability of evidence, but it is a
24 procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but
25 that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."
26 *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

27 The Confrontation Clause applies to all "testimonial" statements. *See Crawford*, 541 U.S.
28 at 50-51. "Testimony . . . is typically a solemn declaration or affirmation made for the purpose of

1 establishing or proving some fact.” *Id.* at 51 (internal quotation marks and brackets omitted); *see*
2 *id.* at 51 (“[a]n accuser who makes a formal statement to government officers bears testimony in a
3 sense that a person who makes a casual remark to an acquaintance does not”); *id.* at 68
4 (“[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary
5 hearing, before a grand jury, or at a former trial; and to police interrogations”). In *Davis v.*
6 *Washington*, 547 U.S. 813 (2006), the Supreme Court distinguished testimonial and
7 nontestimonial statements to police. “Statements are nontestimonial when made in the course of
8 police interrogation under circumstances objectively indicating that the primary purpose of the
9 interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial
10 when the circumstances objectively indicate that there is no such ongoing emergency, and that the
11 primary purpose of the interrogation is to establish or prove past events potentially relevant to later
12 criminal prosecution.” *Id.* at 822; *see, e.g.*, *id.* at 826-28 (victim’s frantic statements to a 911
13 operator naming her assailant who had just hurt her were not testimonial); *id.* at 829-30 (victim’s
14 statements to officer telling him what had happened were testimonial, as there was no emergency
15 in progress and were made after police officer had separated victim and assailant); *Crawford*, 541
16 U.S. at 39-40, 68 (statements were testimonial where made by witness at police station to a series
17 of questions posed by an officer who had given *Miranda* warnings to witness and was taping and
18 making notes of the answers).

19 Before *Crawford* was decided, the Confrontation Clause analysis had been governed by the
20 “indicia of reliability” test set out in *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980). Under the
21 *Roberts* test, hearsay statements could be introduced only if the witness was unavailable at trial
22 and the statements had “adequate indicia of reliability,” i.e., the statements fell within a “firmly
23 rooted hearsay exception” or bore “particularized guarantees of trustworthiness.” *Roberts*, 448
24 U.S. at 66. *Roberts* was overruled in *Crawford*, although some readers of the *Crawford* opinion
25 believed that *Roberts* was not overruled as to nontestimonial statements. Two years later, the
26 Supreme Court clarified in *Davis v. Washington*, 547 U.S. 813, 821 (2006), that the *Roberts* test
27 had *no* continuing validity. Nontestimonial hearsay, “while subject to traditional limitations upon
28 hearsay evidence, is not subject to the Confrontation Clause.” *Davis*, 547 U.S. at 821. The

1 Supreme Court made the same point again the following term, when it referred to
2 “*Crawford*’s elimination of Confrontation Clause protection against the admission of unreliable
3 out-of-court nontestimonial statements.” *Whorton v. Bockting*, 549 U.S. 406, 420 (2007).

4 In an en banc decision, the Ninth Circuit has recognized that the *Roberts* test no longer
5 survives, and that nontestimonial statements are now outside the scope of the protection of the
6 Confrontation Clause. *See United States v. Larson*, 495 F.3d 1094, 1099 n.4 (9th Cir. 2007) (en
7 banc). The court explained that it earlier was unresolved whether the *Roberts* test “to determine
8 the admissibility of out-of-court nontestimonial statements survived *Crawford*,” but the Supreme
9 Court then clarified in *Bockting*, 549 U.S. 406, “that *Crawford* ‘eliminat[es] Confrontation Clause
10 protection against the admission of unreliable out-of-court non-testimonial statements’ and that
11 ‘the Confrontation Clause has no application to such statements and therefore permits their
12 admission even if they lack indicia of reliability.’” *Larson*, 495 F.3d at 1099 n.4 (alteration in
13 original); *see also Delgadillo v. Woodford*, 527 F.3d 919, 924 (9th Cir. 2008) (“*Crawford* rejected
14 [the *Roberts*] framework for analyzing Confrontation Clause violations,” and nontestimonial
15 statements no longer raise Confrontation Clause concerns).³

16 There is now a bright line rule: the Confrontation Clause does not apply to nontestimonial
17 hearsay. *See Bockting*, 549 U.S. at 420; *Davis*, 547 U.S. at 821; *Crawford*, 541 U.S. at 50-51;
18 *Larson*, 495 F.3d at 1099 n.4; *Delgadillo*, 527 F.3d at 924.

19

20 ³ Other circuits also have concluded that the Confrontation Clause no longer applies to
21 nontestimonial hearsay statements, although they have not all agreed on whether it was *Crawford*,
22 *Davis* or *Bockting* that sounded the death knell. *See United States v. Castro-Davis*, 612 F.3d 53,
23 64 n.14 (1st Cir. 2010) (“until *Davis*, *Roberts* remained the controlling precedent for judging
24 whether non-testimonial hearsay violated the Confrontation Clause. After *Davis*, however, non-
25 testimonial hearsay no longer implicates the Confrontation Clause at all”); *United States v. Smalls*,
26 605 F.3d 765, 774 (10th Cir. 2010) (footnote omitted) (*Davis* “squarely confronted the issue of
27 whether the Confrontation Clause had any application to nontestimonial hearsay statements, or, in
28 other words, whether any portion of *Roberts* remained good law. In *Davis*, the Court placed the
question of the admissibility of nontestimonial hearsay statements entirely outside the confines of
the Confrontation Clause and rendered *Roberts* academic”); *United States v. Johnson*, 581 F.3d
320, 325 (6th Cir. 2009) (although it had been an open question whether nontestimonial
statements continued to be governed by the *Roberts* test after *Crawford*, the Supreme Court’s later
decisions in *Davis* and *Bockting* answered the question in the negative).

1 The statements at issue here are not testimonial. The out-of-court statements made during
2 a private conversation between brothers are just the sort of communications that courts have
3 repeatedly held to be nontestimonial and therefore outside the protection of the Confrontation
4 Clause. *See, e.g., Desai v. Booker*, 732 F.3d 628, 630 (6th Cir. 2013) (“the Confrontation Clause
5 no longer applied to nontestimonial hearsay such as the friend-to-friend confession”); *United
6 States v. DeLeon*, 678 F.3d 317, 321-24 (4th Cir. 2012), *judgment vacated on other grounds*, 133
7 S. Ct. 2850 (2013) (admission of evidence of stepson’s statements describing his defendant-
8 stepfather’s disciplinary methods to social worker made several months before the stepson died
9 did not implicate the Confrontation Clause because they were made for purposes of formulating a
10 family treatment plan and were not testimonial); *United States v. Berrios*, 676 F.3d 118, 127-28
11 (3d Cir. 2012) (admission of evidence of surreptitiously recorded jailhouse conversations between
12 codefendants did not violate the Confrontation Clause because they were not testimonial. The
13 admission of the nontestimonial hearsay statements from Richard Peacock to Michael Peacock did
14 not implicate, let alone violate, Mr. Rogers’ Confrontation Clause rights.⁴

15 The foregoing is fatal to Mr. Rogers’ claim that his trial counsel provided ineffective
16 assistance in not making a Confrontation Clause objection. Trial counsel did not engage in
17 deficient performance, and no prejudice resulted, when counsel did not make the objection that
18 would have been legally meritless. *See generally Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir.
19 1996) (failure to take a futile action can never be deficient performance). Mr. Rogers is not
20 entitled to habeas relief on his claim that counsel provided ineffective assistance in not asserting a
21 Confrontation Clause objection to Michael Peacock’s testimony about Richard Peacock’s

22
23 ⁴ In his traverse, Mr. Rogers argues that the testimony was impermissible under *Williamson v.*
24 *United States*, 512 U.S. 594 (1994). *Williamson* does not aid the analysis here for three reasons.
25 First, it was not a decision interpreting the constitution and instead was an interpretation of
26 Federal Rule of Evidence 804(b)(3), which provides the declaration against interest exception to
27 the federal hearsay rule. The Federal Rules of Evidence do not govern the conduct of trials in
28 California state courts. Second, *Williamson* expressly declined to decide the Confrontation Clause
question: “In light of this disposition, we need not address Williamson’s claim that the statements
were also made inadmissible by the Confrontation Clause.” *Williamson*, 512 U.S. at 605. Third,
even if *Williamson* had reached the Confrontation Clause issue, the decision would be of little help
because it predicated *Crawford* and likely would have relied on the indicia-of-reliability test that
later was rejected in the *Crawford* decision.

1 statements.

2 C. Claim 3: Ineffective Assistance of Appellate Counsel

3 In his third claim, Mr. Rogers contends that his appellate counsel was ineffective in that he
4 failed to make two articular arguments. First, he asserts that appellate counsel failed to argue that
5 trial counsel was ineffective in not making a Confrontation Clause objection to Michael Peacock's
6 testimony about Richard Peacock's statements. (This claim is based on the same testimony that
7 gives rise to Mr. Rogers' second claim, discussed in the preceding section.) Second, he asserts
8 that appellate counsel failed to argue on direct review that Mr. Masuda's failure to give notice of
9 Mr. Rogers of his intent to withdraw denied him counsel and was federal structural error.

10 The California Supreme Court rejected Mr. Rogers' ineffective assistance of appellate
11 counsel claims without discussion.

12 The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the
13 effective assistance of counsel on his first appeal as of right. *See Evitts v. Lucey*, 469 U.S. 387,
14 391-405 (1985). Claims of ineffective assistance of appellate counsel are reviewed according to
15 the standard set out in *Strickland*. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). First, the
16 petitioner must show that counsel's performance was objectively unreasonable, which in the
17 appellate context requires the petitioner to demonstrate that counsel acted unreasonably in failing
18 to discover and brief a merit-worthy issue. *Smith*, 528 U.S. at 285; *Moormann v. Ryan*, 628 F.3d
19 1102, 1106 (9th Cir. 2010). Second, the petitioner must show prejudice, which in this context
20 means that the petitioner must demonstrate a reasonable probability that, but for appellate
21 counsel's failure to raise the issue, the petitioner would have prevailed in his appeal. *Smith*, 528
22 U.S. at 285-86; *Moormann*, 628 F.3d at 1106.

23 1. Failure to Argue Trial Counsel's Ineffectiveness

24 To determine whether appellate counsel's failure to raise a claim of ineffective assistance
25 of trial counsel was objectively unreasonable and prejudicial, the district court must first assess the
26 merits of the underlying claim that trial counsel provided constitutionally deficient performance.
27 *Moormann*, 628 F.3d at 1106-07. If trial counsel's performance was not objectively unreasonable
28 or did not prejudice the petitioner, then appellate counsel did not act unreasonably in failing to

1 raise a meritless claim of ineffective assistance of counsel, and the petitioner was not prejudiced
2 by appellate counsel's omission. *Id.*

3 The California Supreme Court's rejection of Mr. Rogers' claim was not contrary to or an
4 unreasonable application of clearly established precedent from the U.S. Supreme Court. As
5 explained in the preceding section, there was no Confrontation Clause objection that would have
6 succeeded regarding the admission of Michael Peacock's testimony as to the statements that
7 Richard Peacock had made. Therefore, trial counsel was not ineffective in failing to object to the
8 testimony on Confrontation Clause grounds and appellate counsel was not ineffective in not
9 raising trial counsel's failure to object as a basis for reversal on appeal. Mr. Rogers is not entitled
10 to relief on this claim.

11 2. Failure To Argue Structural Error

12 On direct appeal, appellate counsel argued that Mr. Masuda failed to comply with
13 California Code of Civil Procedure sections 284 and 285, two statutes setting out the procedures
14 for withdrawal of counsel, and that these failures prejudiced Mr. Rogers.⁵ The California Court of
15 Appeal rejected that argument, stating that Mr. Rogers "does not adequately explain how
16 Masuda's request to be relieved, based on a conflict of interest, violated either of these
17 provisions." *Rogers*, 2012 WL 2053568, at *9. Mr. Rogers now argues that appellate counsel was
18 ineffective in not arguing that Mr. Masuda's failure to give notice to Mr. Rogers of his intent to
19 withdraw denied him counsel and was federal structural error.

20 The California Supreme Court rejected the ineffective assistance of appellate counsel claim
21 without discussion.

22 There are two broad types of constitutional errors that may occur during the course of a

23 _____
24 ⁵ California Code of Civil Procedure section 284 provides: "The attorney in an action or special
25 proceeding may be changed at any time before or after judgment or final determination, as
26 follows: [¶] 1. Upon the consent of both client and attorney, filed with the clerk, or entered upon
the minutes; [¶] 2. Upon the order of the court, upon the application of either client or attorney,
after notice from one to the other."

27 California Code of Civil Procedure section 285 provides: "When an attorney is changed, as
28 provided in the last section, written notice of the change and of the substitution of a new attorney,
or of the appearance of the party in person, must be given to the adverse party. Until then he must
recognize the former attorney."

1 criminal prosecution: trial errors and structural errors. A trial error is an error that is subject to a
2 harmlessness analysis. A structural error is a “defect affecting the framework within which the
3 trial proceeds, rather than simply an error in the trial process itself.” *Arizona v. Fulminante*, 499
4 U.S. 279, 310 (1991). Where a criminal proceeding is undermined by a structural error, the
5 “criminal trial cannot reliably serve its function as a vehicle for determination of guilt or
6 innocence,” and the defendant’s conviction must be reversed. *Id.* These cases are rare and require
7 automatic reversal. *Washington v. Recuenco*, 548 U.S. 212, 218 (2006); *Brecht v. Abrahamson*,
8 507 U.S. 619, 629-30 (1993).

9 The list of Supreme Court cases in which structural error analysis has been found to apply
10 is short. *Campbell v. Rice*, 408 F.3d 1166, 1172 (9th Cir. 2005). They are: *Sullivan v.*
11 *Louisiana*, 508 U.S. 275, 281 (1993) (defective instruction on the beyond-a-reasonable-doubt
12 standard); *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986) (unlawful exclusion of member of
13 defendant’s race from grand jury); *Waller v. Georgia*, 467 U.S. 39, 49-50, 49 n.9 (1984) (denial of
14 right to public trial); *McKaskle v. Wiggins*, 465 U.S. 168, 177-78 n.8 (1984) (violation of right to
15 self-representation at trial); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (deprivation of
16 right to counsel); and *Tumey v. Ohio*, 273 U.S. 510, 531-32 (1927) (trial by biased judge). *See*
17 *Campbell*, 408 F.3d at 1172.

18 In *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), the Supreme Court held that the
19 erroneous denial of counsel of choice also is structural error. *Id.* at 146. In *Gonzalez-Lopez*, the
20 parties did not dispute that the district court erroneously deprived the defendant of his choice of
21 counsel. *Id.* at 144. With that concession, there were two questions for the Supreme Court to
22 answer. The first question was whether the defendant also had to show that replacement counsel
23 provided ineffective assistance at the trial or that the defendant was otherwise prejudiced for a
24 Sixth Amendment violation to have occurred. *Id.* at 144. The Supreme Court answered this
25 question in the negative. “Where the right to be assisted by counsel of one’s choice is wrongly
26 denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a
27 Sixth Amendment violation. Deprivation of the right is ‘complete’ when the defendant is
28 erroneously prevented from being represented by the lawyer he wants, regardless of the quality of

1 the representation he received.” *Id.* at 148. The second, similar-sounding but analytically distinct,
2 question was whether the denial of the Sixth Amendment right to counsel of choice was structural
3 error. *Id.* at 148-50. The Supreme Court held that it was structural error. *Id.*

4 Mr. Rogers urges that his appellate counsel should have argued that Mr. Masuda’s failure
5 to provide notice of his withdrawal amounted to structural error, as established by *Gonzalez-*
6 *Lopez*. Such an argument would have had no likelihood of success. First, the *Gonzalez-Lopez*
7 case was about the denial of the Sixth Amendment right to choice of counsel and does not control
8 the analysis of a claimed *state* law error -- i.e., the failure to comply with the procedures in
9 California Code of Civil Procedure sections 284 and 285 for withdrawing from a case. Since there
10 is no federal constitutional violation stemming from the alleged state law error, there is no
11 structural error. Federal habeas relief is not available for such state law errors. *See Swarthout v.*
12 *Cooke*, 562 U.S. 216, 219 (2011).

13 Second, Mr. Rogers’ argument presupposes that there was a denial of counsel of choice but
14 it was incumbent on him to first show a denial of counsel of choice, because unless there is a
15 denial of counsel, there is no constitutional error, and hence, the court has no occasion to consider
16 whether any error was structural or trial error. Here, there was no showing of a denial of counsel
17 of choice; defense counsel wanted to withdraw and the court did not force counsel out. The Sixth
18 Amendment right to counsel of choice is not limitless, as explained in *Wheat v. United States*, 486
19 U.S. 153, 159 (1988). A defendant has no right to be represented by “an advocate who is not a
20 member of the bar,” “a defendant may not insist on representation by an attorney he cannot afford
21 or who for other reasons declines to represent the defendant,” and a defendant may not insist on
22 being represented by “an attorney who has a previous or ongoing relationship with an opposing
23 party, even when the opposing party is the Government.” *Id.* When he moved to withdraw, Mr.
24 Masuda put himself in the category of an attorney “who for other reasons declines to represent the
25 defendant.” *Id.* The right to choice of counsel did not give Mr. Rogers the right to force attorney
26 Masuda (who believed that he had an ethical obligation to withdraw) to unwillingly remain in the
27 case. Arguing that denial of choice of counsel is structural error would not have been an effective
28 appellate strategy unless and until the appellate attorney showed that there *was* a denial of choice

1 of counsel. *See generally Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) (“Experienced advocates
2 since time beyond memory have emphasized the importance of winnowing out weaker arguments
3 on appeal and focusing on one central issue if possible, or at most on a few key issues”).

4 Although the Supreme Court has determined that denial of choice of counsel is structural
5 error (*Gonzalez-Lopez*) and that denial of counsel is structural error (*Gideon*), the Supreme Court
6 has never established that a lawyer’s failure to provide his client with notice of a motion to
7 withdraw from representing the client in violation of state procedural rules amounts to a Sixth
8 Amendment violation that is structural error. The California Supreme Court’s rejection of Mr.
9 Rogers’ claim that appellate counsel was ineffective in failing to argue that a lack of notice of Mr.
10 Masuda’s intent to withdraw amounted to federal structural error was not contrary to or an
11 unreasonable application of clearly established law from the U.S. Supreme Court. He is not
12 entitled to the writ on this claim.

13 D. No Certificate of Appealability

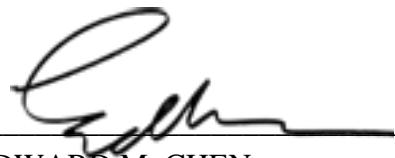
14 A certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c). This is not a case in
15 which “reasonable jurists would find the district court’s assessment of the constitutional claims
16 debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, a certificate of
17 appealability is **DENIED**.

18 **VI. CONCLUSION**

19 For the foregoing reasons, the petition for writ of habeas corpus is **DENIED** on the merits.
20 The Clerk shall close the file.

21
22 **IT IS SO ORDERED.**

23
24 Dated: March 15, 2016



25
26 EDWARD M. CHEN
27 United States District Judge
28